No. 03-509

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 307(f) of the Clean Air Act, which authorizes an award of attorney's fees against the government "whenever [the court] determines that such award is appropriate," 42 U.S.C. 7607(f), authorizes a court to award attorney's fees to a party that has failed to obtain a judgment on the merits of its claims or a consent decree granting judicially approved relief.

PARTIES TO THE PROCEEDING

Petitioners are the Environmental Protection Agency and Marianne L. Horinko, the Acting Administrator of the Environmental Protection Agency. Respondents are the Sierra Club and the New York Public Interest Research Group, Inc.

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The Solicitor General, on behalf of the Environmental Protection Agency, et al. (EPA), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 322 F.3d 718.

JURISDICTION

The decision of the court of appeals was entered on March 18, 2003. A petition for rehearing and a petition for rehearing en banc were denied on June 5, 2003 (App., *infra*, 23a-26a). On August 25, 2003, Chief Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including October 3,

2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 307(f) of the Clean Air Act provides:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

42 U.S.C. 7607(f). Section 307(f) and other relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set forth at App., *infra*, 50a-53a.

STATEMENT

Respondents Sierra Club and the New York Public Interest Research Group, Inc., petitioned the court of appeals to review a final EPA rule under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, that extended the agency's "interim approvals" of certain state and local permit programs. See 65 Fed. Reg. 32,035 (2000). Rather than litigate that dispute, EPA and respondents reached an out-of-court settlement agreement, App., *infra*, 27a-44a, which led to the dismissal of the action at the parties' joint request, *id.* at 21a-22a. The court of appeals later directed EPA to pay respondents' attorney's fees notwithstanding the fact that the court awarded no relief on the merits. *Id.* at 2a. The court concluded that Section 307(f) of the Clean Air Act, which authorizes an award of attorney's fees when "appropriate," allows an award under the same "catalyst theory" that this Court rejected in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). The court of appeals reached that conclusion even though this Court had previously ruled in *Ruckelshaus*

v. *Sierra Club*, 463 U.S. 680, 694 (1983), that, unless a party "prevailed" in the sense that it achieved "some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under § 307(f)."

A. The Relevant Provisions Of The Clean Air Act

The Clean Air Act establishes a comprehensive program, based on principles of cooperative federalism, for controlling air pollution. The Act directs EPA to undertake a wide variety of regulatory initiatives, which are subject to judicial review. See, *e.g.*, CAA § 307(d), 42 U.S.C. 7607(d). It authorizes individuals to petition the courts of appeals for judicial review of specified EPA administrative actions and additionally provides that a petition for review of "nationally applicable regulations" may be filed "only in the United States Court of Appeals for the District of Columbia." CAA § 307(b), 42 U.S.C. 7607(b). Section 307(f) further provides that, in such a proceeding, "the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." 42 U.S.C. 7607(f).

This case arises from respondents' challenge to EPA's nationally applicable regulations respecting the Clean Air Act's "Title V permit program." In 1990, Congress directed EPA to issue regulations establishing the minimum requirements for operating permit programs, which are administered by EPA and State or local air pollution control agencies. See CAA §§ 501-507, 42 U.S.C. 7661-7661f. Those permit programs consolidate all applicable requirements for each major stationary source of air pollution into a single compre-

hensive permitting document. See CAA § 502, 42 U.S.C. 7661a.

Under the Title V permit program, States (or local governments within a State) submit to EPA proposed permit programs based upon state law that implement Title V within their borders. CAA § 502(d), 42 U.S.C. 7661a(d). After notice-and-comment rulemaking procedures, EPA either approves or disapproves the programs. *Ibid.* If EPA finds that a State's program "substantially meets the requirements of the [CAA], but is not fully approvable," EPA may grant "interim" approval to that State's program for a period of up to two years, during which time the State would have the opportunity to correct any deficiencies in its program and obtain full EPA approval. CAA § 502(g), 42 U.S.C. 7661a(g). Ultimately, if EPA does not fully approve a State's program, EPA must promulgate, administer, and enforce a permit program for the State, CAA § 502(d)(3) and (i)(4), 42 U.S.C. 7661a(d)(3) and (i)(4), and the State is subject to prescribed sanctions for its failure to develop its own permitting program, CAA § 502(d)(2)(A)-(C), 42 U.S.C. 7661a(d)(2)(A)-(C).

B. EPA's Challenged Regulatory Action

Numerous States submitted Title V permit programs that "substantially" met EPA's requirements, and EPA issued interim approvals for those programs. See, *e.g.*, 59 Fed. Reg. 55,813 (1994). During the period that those interim approvals were in effect, EPA was considering whether to modify its regulatory requirements for an approvable Title V permit program. Those modifications, once finalized, would require States to make corresponding changes to their permit programs. EPA therefore extended, through several administrative actions, the time for States to address the existing

deficiencies in programs with interim approvals under a schedule that also would allow the States to make changes in response to EPA's anticipated program modifications. See, *e.g.*, 62 Fed. Reg. 45,732 (1997); 63 Fed. Reg. 40,054 (1998). EPA encountered delays, however, in issuing modified program requirements. EPA concluded that it could not extend the interim approvals indefinitely and therefore issued a final extension of its interim approvals, from June 1, 2000, to December 1, 2001, for more than 36 States to submit the necessary changes so that EPA could fully approve their permit programs. See 65 Fed. Reg. at 32,035; *id.* at 32,036-32,037.

The Sierra Club filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 307(b) of the Clean Air Act, challenging EPA's final extension of its interim approvals on the ground that the States' submissions were already overdue. The parties entered into an out-of-court settlement agreement to resolve the dispute. See App., *infra*, 27a-44a. The settlement agreement left EPA's extension in place, and provided, among other things, that if EPA issued no additional time extensions and modified its regulations that might have allowed extensions of interim approvals in certain other, limited circumstances, then the parties would stipulate to dismissal of the petition for review. *Id.* at 28a-33a (paras. 1-11). The petition for review was held in abeyance pending EPA's taking action that comported with the settlement terms, and once EPA met those terms, the court of appeals granted the parties' joint motion to dismiss the petition. See *id.* at 21a-22a. The settlement agreement and the court's order of dismissal preserved respondents' right to seek attorney's

fees and the government's right to oppose that request. See *id.* at 21a, 32a (para. 5).

C. The Request For Attorney's Fees

Respondents filed a motion for attorney's fees under Section 307(f) of the Clean Air Act, 42 U.S.C. 7607(f). The government objected to the fee request on the ground that Section 307(f) does not authorize an award of fees in the absence of a favorable judgment on the merits or a court-ordered consent decree. To facilitate resolution of the dispute, the parties stipulated to the amount of the attorney's fee award that would be paid to respondents if they were successful in establishing their entitlement to fees. See App., *infra*, 45a-49a.

The government argued that the question whether Section 307(f) authorizes fees in the circumstances presented here depends, first, on the application of sovereign immunity principles. The government asserted that it cannot be required to pay attorney's fees in the absence of a clear and express congressional waiver of its sovereign immunity from such assessments. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983). The government relied on this Court's decision in *Ruckelshaus*, which stated, in an attorney's fee dispute involving Section 307(f) of the Clean Air Act, the same fee-shifting provision at issue here:

> Waivers of immunity must be "construed strictly in favor of the sovereign," *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not "enlarge[d] . . . beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927).

Id. at 685-686. Accord *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991); *United States* v. *Mitchell*, 445 U.S. 535, 538

(1980); *United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 513-514 (1940).

The government further argued that this Court's recent decision in *Buckhannon*, particularly when read in conjunction with the Court's earlier decision in *Ruckelshaus*, precluded the award of attorney's fees in this case. This Court ruled in *Buckhannon* that statutes authorizing attorney's fee awards to a "prevailing party" do not allow a fee award to "a party that has failed to secure a judgment on the merits or a court-ordered consent decree." 532 U.S. at 600. The Court explained that private settlement agreements lack the characteristics of judicial approval and enforceability necessary to satisfy the "prevailing party" requirement. *Id.* at 603-604 n.7. The Court specifically concluded that statutes authorizing fee awards to a "prevailing party" do not allow an award to a plaintiff who seeks fees on the theory that his lawsuit was a "catalyst" that brought about a voluntary change in the defendant's conduct. The Court categorically rejected the so-called "catalyst theory" as a permissible basis for awarding fees under "prevailing party" statutes. *Id.* at 610.

The government additionally argued that the Court's ruling in *Buckhannon* clarified the meaning of Section 307(f). The Court's decision in *Ruckelshaus* had characterized Section 307(f) as authorizing fee awards only to parties who "prevailed" in the sense that they achieved "some success on the merits." 463 U.S. at 682. The Court reasoned that "the term 'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.* at 686. The government accordingly argued that the Court's rejection of the catalyst

theory in *Buckhannon* should also apply to fee-shifting provisions such as Section 307(f), which grant fees to what are, in effect, "*partially prevailing* parties." See *Id.* at 684, 688, 694. Taken together, the government urged, *Buckhannon* and *Ruckelshaus* preclude a party from obtaining attorney's fees under a "when appropriate" fee-shifting provision such as Section 307(f) unless that party has obtained at least a partially favorable judgment on the merits or a partially favorable court-ordered consent decree.

The court of appeals rejected the government's position on the basis of footnote eight of the *Ruckelshaus* opinion. The issue in *Ruckelshaus* was whether an unsuccessful plaintiff could obtain fees under Section 307(f) on the theory that the losing plaintiff's suit nevertheless served some public benefit. See 463 U.S. at 682. Footnote eight addressed a passage of the legislative history of Section 304(d) of the Clean Air Act, which authorizes district courts to award attorney's fees when "appropriate" in citizen enforcement suits brought under Section 304(a), 42 U.S.C. 7604(a). According to the respondents in that case, the Section 304(d) legislative history supported an award of fees to unsuccessful plaintiffs under Section 307(f). The footnote states in full as follows:

> Respondents also rely on a single sentence from the 1970 Senate Report:
>
> > "The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For

> instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 91-1196, p. 38 (emphasis added).

The approval of fee awards in "legitimate" actions offers respondents little comfort: "legitimate" means "being exactly as proposed: neither spurious nor false," which does not describe respondents' claims in this case. Respondents contend, however, that Congress intended that the term "appropriate" to encompass situations beyond those mentioned in the legislative history, and, therefore, that the term reaches even totally unsuccessful actions. This is, of course, possible, but not likely. Congress found it necessary to explicitly state that the term appropriate "extended" to suits that forced defendants to abandon illegal conduct, although without a formal court order; this was no doubt viewed as a somewhat expansive innovation, since, under then-controlling law, see *infra*, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that "appropriate" also would extend to the far more novel, costly, and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, as is demonstrated by Congress' careful statement that a *less* sweeping innovation *was* adopted.

463 U.S. at 686-687 n.8. The government argued that this footnote was dictum and that the legislative history

of Section 304(d) discussed therein could not enlarge the partial waiver of sovereign immunity set forth in the text of Section 307(f). The court of appeals nevertheless expressly declined to apply the rules for construing waivers of sovereign immunity and for departing from the American Rule. App., *infra*, 10a. Instead, the court concluded that footnote eight controlled the outcome of the case, stating that "'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" *Id.* at 11a (quoting *United States* v. *Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)).

The court further stated that:

> Nothing in *Buckhannon* alters our conclusion that *Ruckelshaus*'s footnote eight controls the issue now before us. Although *Buckhannon* rejected the catalyst theory, the statute at issue there authorizes fee awards only to "prevailing part[ies]." By comparison, *Ruckelshaus*'s footnote eight analysis directly applies to the issue we face here, as it interprets section 307(f) to authorize fee awards for "suits that forced defendants to abandon illegal conduct, although without a formal court order." 463 U.S. at 686 n.8.

App., *infra*, 13a. The court of appeals added:

> In the end, we need not decide whether *Buckhannon*—which never so much as mentions *Ruckelshaus*—impliedly overrules footnote eight, for *Buckhannon*'s failure to do so expressly is dispositive. * * * Here, the case that "directly controls" is *Ruckelshaus*. Whether *Ruckelshaus* "rest[s] on reasons rejected" by *Buckhannon* is a matter for the Supreme Court, not us.

Id. at 14a-15a (quoting *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). The court then went on to conclude that respondents qualified for attorney's fees under a three-part catalyst test that it derived largely from Justice Ginsburg's dissenting opinion in *Buckhannon*. See *id.* at 16a-19a.

REASONS FOR GRANTING THE PETITION

This Court has set out clear principles for construing congressional enactments that authorize courts to award attorney's fees. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983). The court of appeals in this case disregarded those principles and construed the Clean Air Act to authorize fee payments from the public fisc to litigants who do not satisfy the prescribed statutory requirements. The court's decision is wrong and cannot be sensibly reconciled with this Court's rulings in *Buckhannon* and *Ruckelshaus*. This Court should accept the court of appeals' invitation to resolve the tension it mistakenly perceived in those cases, which would provide crucial and needed guidance respecting the prerequisites for obtaining attorney's fee awards under numerous federal statutes.

A. The Court Of Appeals Erred In Holding That Section 307(f) Authorizes Attorney's Fee Awards Under The "Catalyst Theory"

This Court's rulings in *Buckhannon* and *Ruckelshaus* provide the controlling principles for resolving whether Section 307(f) authorizes an award of attorney's fees to a party who failed to obtain a favorable judgment on the merits or a court-ordered consent decree. The Court's decision in *Buckhannon* holds that the legal term "prevailing party" does not include a

litigant who obtained no judicial relief on the merits of its claim and merely "achieved the desired result" of its lawsuit because the suit "brought about a voluntary change in the defendant's conduct." 532 U.S. at 600. The Court's decision in *Ruckelshaus* further holds that Section 307(f) authorizes fees only to litigants who "prevail," at least in part, in the sense that they achieve "some degree of success on the merits." 463 U.S. at 686, 694. Taken together, those rulings establish that Section 307(f) does not authorize courts to award fees under the "catalyst theory." A closer inspection of those decisions reinforces that conclusion.

1. This Court explained in *Ruckelshaus* that Congress enacted Section 307(f) against the backdrop of the "American Rule" respecting attorney's fees, "under which even 'the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorney's fee from the *loser*.'" *Ruckelshaus*, 463 U.S. at 683-684 (quoting *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975)). The American Rule requires "explicit statutory authority" before fees may be awarded to a prevailing party. *Buckhannon*, 532 U.S. at 602-603 (citing *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 819 (1994)).

Furthermore, Section 307(f) is a partial waiver of the United States' sovereign immunity, which "must be 'construed strictly in favor of the sovereign' * * * and not 'enlarge[d] . . . beyond what the language requires.'" *Ruckelshaus*, 463 U.S. at 685 (citations omitted). "In determining what sorts of fee awards are 'appropriate,' care must be taken not to 'enlarge' § 307(f)'s waiver of immunity beyond what a fair reading of *the language of the section requires*." *Id.* at 686 (emphasis added). Nothing in the text of Section 307(f) provides the plain language necessary to waive

immunity from fee awards based upon the catalyst theory.

The Court explained in *Ruckelshaus* that "[i]t is difficult to draw any meaningful guidance from § 307(f)'s use of the word 'appropriate.'" 463 U.S. at 683. Under the applicable rules of construction, that absence of clear textual guidance, by itself, should end the inquiry. Under the longstanding sovereign immunity principles cited in *Ruckelshaus*, the statutory text should be construed strictly in favor of the sovereign, and because that text does not clearly and unambiguously waive immunity for catalyst-based fee claims, it should be construed not to do so. See *id.* at 685-686; see also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951); *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927).

The Court ultimately concluded in *Ruckelshaus* that Section 307(f)'s authorization of attorney's fees when "'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." 463 U.S. at 686. That conclusion affirmatively precludes the award of fees here. The Court concluded that

> Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success* even if not major success.

Id. at 688. By "success" the Court plainly meant success on the merits of their legal claims. The Court summarized its holding at the outset of its opinion as follows:

> We conclude that the language of [Section 307(f)], read in the light of the historic principles of fee-

> shifting in this and other countries, requires the conclusion that some success *on the merits* be obtained before a party becomes eligible for a fee award under § 307(f).

Id. at 682 (emphasis added). It repeated that point at the conclusion of the opinion, stating "we hold that, absent some degree of success *on the merits* by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under § 307(f)." *Id.* at 694 (emphasis added). In short, the Court's ruling in *Ruckelshaus*, which holds that a party cannot obtain fees under Section 307(f) unless that party "prevails" in the sense that it achieves at least "some success on the merits," *id.* at 682, 694, establishes that a party cannot obtain fees unless it obtains either a partially favorable judgment on the merits or a partially favorable court-ordered consent decree.

The Court's subsequent decision in *Buckhannon* corroborates that conclusion. The Court ruled that the term "prevailing party," as used in fee-shifting statutes, does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree." 532 U.S. at 600. The Court reasoned that the term "prevailing party" is a "legal term of art" that describes "one who has been awarded some relief by the court," *id.* at 603, and its meaning is reflected in "numerous statutes," "*Black's Law Dictionary*," and the Court's "prior cases," *id.* at 602-603. The term does not include persons who resolve a dispute through a private settlement, which "do[es] not entail the judicial approval and oversight involved in consent decrees." *Id.* at 604 n.7.

The Court's decisions in *Buckhannon* and *Ruckelshaus* use the term "prevailing party" in the same legal

sense. The Court made abundantly clear in *Ruckelshaus* that it employed the phrase as a legal term of art. See 463 U.S. at 686 ("[W]e believe that the term 'appropriate' modifies but does not completely reject the *traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees*.") (emphasis added). See also *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring) ("[W]hen 'prevailing party' is used by courts or legislatures in the context of a lawsuit, it is a term of art."). The Court's decision in *Ruckelshaus* that parties cannot obtain fees under Section 307(f) unless they "prevail" by achieving "some success on the merits" accordingly precludes an award of fees to a party that merely obtains a private out-of-court settlement.

2. The court of appeals rejected the foregoing analysis. That court acknowledged that, were it "operating on a clean slate concerning Section 307(f)'s meaning," it would have "accept[ed] the EPA's invitation to apply standard tools of statutory construction, including *Ruckelshaus*'s presumptions against inferring departures from the American Rule and waivers of sovereign immunity." App., *infra*, 10a. The court of appeals concluded, however, that it should instead take its direction from statements in *Ruckelshaus* that are plainly dicta. See *id.* at 11a (stating that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (quoting *United States* v. *Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)). That approach was misguided in this context, where the Court has already noted the danger of following dicta that is out-of-step with the Court's holdings. As this Court made clear in *Buckhannon*, the proper approach is "to reconcile the plain language of the statutes with our prior *holdings*." 532 U.S. at 605.

There is no serious question that the Court's statements in footnote eight of the *Ruckelshaus* decision are dicta. The plaintiffs in *Ruckelshaus* did not obtain an out-of-court settlement or otherwise induce a change in the government's position. Rather, they categorically lost in court. See *Ruckelshaus*, 463 U.S. at 681 ("In a lengthy opinion, the Court of Appeals rejected all the claims of both EDF and the Sierra Club."). Hence, the Court had no occasion to rule on whether a party who obtains an out-of-court settlement is entitled to attorney's fees. The Court's statements in footnote eight, appropriately submerged beneath the text of its decision, simply responded to one of the plaintiffs' more peripheral arguments based on the legislative history of a different Clean Air Act provision that was not at issue in *Ruckelshaus* (or here). See *id.* at 686 n.8 ("Respondents also rely on a single sentence from the 1970 Senate Report.").

Moreover, neither the *Ruckelshaus* dicta nor the legislative history it discusses provides a persuasive basis for courts to interpret Section 307(f) to authorize catalyst-based fee awards. The Senate Report at issue did not actually address Section 307's provisions for judicial review of agency action—the provision at issue in *Ruckelshaus* and here. Rather, the report addressed the fee-shifting provisions for citizen enforcement actions under Section 304(a) of the Clean Air Act, 42 U.S.C. 7604(a), which could be brought in district courts against, among others, private defendants. See S. Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970) (addressing fee awards under Section 304(d) where "as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation"). The Senate Report's reference to a situation in which a "a defendant abated a violation" plainly does not describe an out-of-court

settlement of a Section 307(b) "petition for review of action of the Administrator." 42 U.S.C. 7607(b). A petition for review is not an "abatement" action, the Administrator is a respondent rather than a "defendant," and the court of appeals does not render a "verdict" respecting a "violation." See *Bennett* v. *Spear*, 520 U.S. 154, 173-174 (1997). The Court's statements in footnote eight are most fairly read as merely contrasting the potential fee recipients described in the legislative report—which included a private party seeking to abate ongoing pollution—and the wholly unsuccessful plaintiffs in *Ruckelshaus*, rather than as definitively determining the legal significance of the statements therein. See *Ruckelshaus*, 463 U.S. at 686 n.8.

The court of appeals' reliance on an expansive reading of the *Ruckelshaus* footnote is particularly infirm in light of this Court's repeated admonitions that statements contained in legislative history cannot waive the government's sovereign immunity:

> A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."

Lane v. *Pena*, 518 U.S. 187, 192 (1996) (quoting *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). See *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (fee-shifting provision in the Equal Access to Justice Act is a partial waiver of sovereign immunity and the legislative history may not enlarge its scope); *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (The "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.") (citation omitted).

While legislative history may provide relevant support for the conclusion that a statute does *not* waive the government's sovereign immunity—which is principally how it was used in footnote 8 of *Ruckelshaus*—it does not suffice to waive that immunity.

The court of appeals also disregarded this Court's admonition that courts should avoid interpreting fee-shifting statutes in a manner that would "spawn[] a second litigation of significant dimension." *Buckhannon*, 532 U.S. at 609 (quoting *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)). Rather, the Court has quite rightly rejected constructions of fee-shifting statutes that would foment litigation over fee entitlements. See *Garland*, 489 U.S. at 791. The Court specifically observed in *Buckhannon* that the catalyst theory "is clearly not a formula for 'ready administrability.'" 532 U.S. at 610 (quoting *Burlington* v. *Dague*, 505 U.S. 557, 566 (1992)).

The court of appeals' decision in this case would spawn the same administrative difficulties that the Court envisioned in *Buckhannon*. The court of appeals adopted a three-part catalyst test to determine whether a fee award was appropriate. See App., *infra*, 16a-18a. Under the court of appeals' catalyst test, a plaintiff must show that (1) the defendant provided "some of the benefit" sought by the lawsuit; (2) "the suit stated a genuine claim, *i.e.*, one that was at least 'colorable,'not 'frivolous, unreasonable, or groundless'"; and (3) the "suit was a 'substantial' or 'significant' cause of defendant's action providing relief." *Id.* at 17a. Those "nuanced" inquiries raise precisely the same problems of "ready administrability" that the Court identified in *Buckhannon*. See 532 U.S. at 610.

This case illustrates the debatable questions of relief and causation that the catalyst test would pose in the

case of out-of-court settlements. Respondents' petition for judicial review challenged EPA's interim approval extension set out in 65 Fed. Reg. at 32,035, but neither the out-of-court settlement nor EPA's actions in implementing the settlement upset that interim approval extension. To the contrary, the settlement *preserved* that extension; respondents merely secured an agreement that they could *seek resumption of the litigation in the court of appeals* if EPA proposed or issued an additional extension. See App., *infra*, 29a (para. 2.D.). EPA's concession on that point was hardly significant since EPA had announced in the very administrative action that respondents challenged—before the petition for review was filed—that EPA would not grant any further interim approval extensions. 65 Fed. Reg. at 32,038. The court of appeals nevertheless incorrectly concluded that the out-of-court settlement was the cause for EPA not issuing further extensions and "bound" EPA "like any relief that this court might have granted on the merits." App., *infra*, 19a. The court's application of its proposed test to award fees on such a questionable basis heralds a steady stream of fee "litigation of significant dimension." *Buckhannon*, 532 U.S. at 609; *Garland*, 489 U.S. at 791.

B. The Court Of Appeals' Decision Conflicts With Decisions Of This Court And Presents An Important Issue Warranting This Court's Review

The court of appeals' rejection of this Court's holdings in *Buckhannon* and *Ruckelshaus* in favor of the *Ruckelshaus* dicta places that court's decision in unavoidable conflict with the decisions of this Court. As *Buckhannon* itself makes clear, the viability of the catalyst theory as a basis for attorney's fees awards turns on the "the plain language of the statutes" and

this Court's "prior *holdings*." 532 U.S. at 605. The court of appeals erred in disregarding those holdings in favor of "dicta in [this Court's] prior cases." *Ibid.* The court of appeals' rationale for its approach—that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative" (App., *infra*, 11a)—is mistaken in this context, as the Court observed in *Buckhannon*.

The Court's review is ultimately warranted in this case for the same reason it was warranted in *Ruckelshaus*. There is a compelling need for the Court to resolve "the important question decided by the Court of Appeals." *Ruckelshaus*, 463 U.S. at 682. Most federal fee-shifting statutes are either "prevailing party" statutes, such as those involved in *Buckhannon*, or "when appropriate" statutes, such as the statute involved in this case. See *id.* at 682 n.1. The Court's review in this case would resolve the single most important attorney's fee issue that has arisen in *Buckhannon*'s wake: whether the catalyst theory remains available under the "when appropriate" statutes. Here, as in *Ruckelshaus*, there is no good reason to postpone resolution of that issue, which affects attorney's fee awards under more than a dozen federal statutes. See *ibid.*; *e.g.*, Endangered Species Act, 16 U.S.C. 1540(g)(4); Toxic Substances Control Act, 15 U.S.C. 2618(d); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1415(g)(4) (also known as the "Ocean Dumping Act"); Surface Mining Control and Reclamation Act, 30 U.S.C. 1270(d); Safe Drinking Water Act, 42 U.S.C. 300j-8(d); and Noise Control Act, 42 U.S.C. 4911(d).

The court of appeals' decision presents a particularly pressing call for this Court's review because of the central role that the District of Columbia Circuit plays in litigation covered by Section 307(f) and other "when

appropriate" fee-shifting statutes. A number of the "when appropriate" fee-shifting statutes authorize fee awards under frequently litigated environmental laws, and the District of Columbia Circuit is the locus of a substantial amount of that litigation. For example, the Clean Air Act requires that many judicial challenges to EPA action, including regulations that have nationwide application, such as the national ambient air quality standards at issue in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), can be brought only in the District of Columbia Circuit. See CAA § 307(b), 42 U.S.C. 7607(b). The government and the public therefore have a strong interest in resolving the scope of the "when appropriate" standard in this case.

Furthermore, this case presents a situation in which the court of appeals' decision is likely to generate wasteful litigation, not only in the District of Columbia Circuit, but also in each of the other circuits where the issue of catalyst-based fees against the government under "when appropriate" fee-shifting provisions remains an open question. If other circuits follow the court of appeals' ruling, then the outcome is still more fee litigation, not only under an approach that conflicts with *Buckhannon* and *Ruckelshaus*, but also under a specific standard for awarding catalyst fees that conflicts with other court decisions. The court of appeals' three-part test for awarding attorney's fees under the catalyst theory is inconsistent with the decisions of other courts of appeals, which have ruled that a party is not entitled to fees under the catalyst theory unless that party can demonstrate that the defendant's action in response to the lawsuit was "required by law." See, *e.g.*, *Amigos Bravos* v. *EPA*, 324 F.3d 1166, 1168, 1174-1176 (10th Cir. 2003); *Loudermill* v. *Cleveland Bd. of*

Educ., 844 F.2d 304, 313 (6th Cir.), cert. denied, 488 U.S. 941 and 946 (1988).

As the Court observed in *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), "[a] request for attorney's fees should not result in a second major litigation." Litigation over fees is not a productive use of judicial resources; rather such disputes "take up lawyers' and judges' time that could more profitably be devoted to other cases." *Id.* at 455 (Brennan, J., concurring in part and dissenting in part). A prompt resolution of the issue would avoid the need for the government to spend considerable financial and litigation resources on collateral attorney's fees issues in an effort to convince another circuit to deviate from the District of Columbia Circuit, while at the same time litigating and paying attorney's fees in the District of Columbia Circuit that may prove unnecessary.

Although this Court frequently allows issues to "percolate" in the lower courts before resolving them, that approach has little to commend it here. As the court of appeals itself recognized, the question whether Section 307(f) authorizes "catalyst-based" awards turns on the proper reconciliation of this Court's decisions in *Buckhannon* and *Ruckelshaus*. App., *infra*, 5a-6a. Further litigation in the courts of appeals is unlikely to provide additional insight on that question, which turns on what significance the Court itself gives to footnote eight of the *Ruckelshaus* decision. As the court of appeals stated, reconciling *Buckhannon* and *Ruckelshaus* "is a matter for the Supreme Court, not us." *Id.* at 15a.

This Court's decision in *Buckhannon* emphasizes the danger of rejecting this Court's "prior *holdings*," *Buckhannon*, 532 U.S. at 605, in favor of "*misleading dicta*," *id.* at 621 (Scalia, J., concurring). Notwithstanding the

Court's admonitions, the court of appeals' decision here is likely to recreate the same situation that this Court faced in *Buckhannon*. This Court's potentially "misleading dicta" in *Ruckelshaus*, revitalized by the court of appeals' ruling that it "directly controls" the construction of "when appropriate" fee-shifting statutes, App., *infra*, 14a-15a, may "nurtur[e] and preserv[e]" a "near-unanimous," but mistaken, interpretation of federal law. See 532 U.S. at 621-622 (Scalia, J., concurring.) See, *e.g.*, *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir.) ("this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings"), cert. denied, 517 U.S. 1211 (1996). If the Court does not act now to correct the court of appeals' error, the government is likely to face substantial and wasteful burdens in litigating attorney's fees claims, and the public treasury is likely to be improperly charged with unauthorized fee awards at a time in which federal funds are urgently needed for other important matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1262

SIERRA CLUB AND
NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND
CHRISTINE TODD WHITMAN, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

Argued: Jan. 23, 2003
Decided: Mar. 18, 2003

On Petitioners' Motion for Attorney's Fees

Before: GINSBURG, *Chief Judge*, and ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

TATEL, *Circuit Judge*: The Clean Air Act authorizes an award of attorney's fees "whenever [the court] determines that such award is appropriate." In this case, organizations that settled their Clean Air Act suit against the Environmental Protection Agency prior to adjudication on the merits move for an award of fees. The EPA opposes the motion, arguing that only parties who obtain court-awarded relief may recover fees. Applying relevant Supreme Court precedent, we hold that the Clean Air Act, unlike statutes that authorize fee awards only to "prevailing part[ies]," permits awards to so-called catalysts—parties who obtain, through settlement or otherwise, substantial relief prior to adjudication on the merits. Because we find an award of fees "appropriate" under the circumstances of this case, we grant the motion.

I.

Title V of the 1990 Amendments to the Clean Air Act, 42 U.S.C. §§ 7661-7661f, establishes procedures through which the Environmental Protection Agency may authorize states and localities to issue stationary air pollution source operating permits. *See generally Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1017 (D.C Cir. 2000). Governors must submit proposals for state or locally administered permit programs "[n]ot later than 3 years after November 15, 1990," and the EPA must "approve or disapprove" the proposed programs within one year of receipt. 42 U.S.C. § 7661a(d)(1); *see also* 40 C.F.R. § 70.2 (specifying that "*State* means any non-Federal permitting authority, including any local agency"). If a program "substantially meets the requirements [for approval], . . . but is not fully approvable," the EPA may "grant the program interim approval," which "shall expire . . .

not later than 2 years after such approval, and may not be renewed." 42 U.S.C. § 7661a(g). If a state fails to meet Title V deadlines for obtaining program approval, however, the EPA must itself "promulgate, administer, and enforce a program . . . for that State." *Id.* § 7661a(d)(3), (g), (i)(4).

In 1992, the EPA promulgated 40 C.F.R. § 70.4(d)(2), which provided—in language virtually identical to Title V's—that "[i]nterim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed." Four years later, in 1996, the EPA issued a rule that (1) appended a second sentence to 40 C.F.R. § 70.4(d)(2) providing that "[n]otwithstanding the previous sentence, the Administrator may, through rulemaking, provide for a longer period of time on an individual basis, but only once per State" and (2) extended most existing interim approvals by ten months. Operating Permits Program Interim Approval Extensions, 61 Fed.Reg. 56,368, 56,368, 56,370 (Oct. 31, 1996). Twice again, in 1997 and 1998, the EPA extended existing interim approvals. Extension of Operating Permits Program Interim Approvals, 62 Fed.Reg. 45,732 (Aug. 29, 1997); Extension of Operating Permits Program Interim Approval Expiration Dates, 63 Fed.Reg. 40,054 (July 27, 1998). Neither rule, however, cited any statutory or regulatory authority for the blanket extension. In fact, both rules expressly stated that the EPA was *not* acting pursuant to 40 C.F.R. § 70.4(d)(2), though the rules reserved the agency's purported authority to do so in the future. Roughly a week before the 1998 blanket interim approval would have expired, the EPA issued yet another rule, this time extending existing interim approvals for more than thirty states until December 1,

2001. Extension of Operating Permits Program, Interim Approval Expiration Dates, 65 Fed. Reg. 32,035 (May 22, 2000). Like the previous extension rules, this rule cited neither statutory nor regulatory authority for the blanket extension. Unlike the previous rules, however, it not only failed to expressly reserve the EPA's authority to offer additional extensions under 40 C.F.R. § 70.4(d)(2), but also gave "notice that no additional extensions of interim approval deadlines will be granted." *Id.* at 32,038.

Sierra Club and New York Public Interest Research Group filed a petition in this court challenging the EPA's May 22, 2000 rule as contrary to Title V. After Petitioners had filed their opening brief and six days before the EPA's brief was due, the parties reached a settlement and filed a joint motion requesting a stay of proceedings. Under the settlement, the EPA agreed to (1) grant no further interim approval extensions; (2) remove the language from 40 C.F.R. § 70.4(d)(2) purportedly authorizing the EPA to extend interim approvals beyond two years on a case-by-case basis; (3) initiate a ninety-day formal notice-and-comment process for interested parties to identify deficiencies in both fully approved and interim programs; and (4) provide responses to all comments received through the notice-and-comment process. The settlement agreement provided that if the EPA breached any of its promises, Petitioners could ask the court to lift the stay and set a new briefing schedule. The settlement agreement also obligated the parties to seek joint dismissal if, by December 1, 2001, the EPA had fulfilled its promises. Dismissal, the agreement stated, would "provide an opportunity for Sierra Club to petition [this]

Court for attorneys' fees within a reasonable period of time, which petition EPA may oppose."

In January 2002, after the EPA fulfilled its obligations under the settlement agreement, this court, at the parties' request, dismissed the case. Acting pursuant to the settlement agreement and citing CAA section 307(f), 42 U.S.C. § 7607(f), Petitioners then filed a motion requesting attorney's fees. Section 307(f) provides: "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." *Id.*

Because the parties have agreed on the amount that the EPA will pay if this court rules for Petitioners, the only question before us is whether a fee award is appropriate in the first place. The EPA argues that section 307(f)'s "whenever . . . appropriate" standard does not authorize fee awards to parties, such as Petitioners, whose litigation produces no court-awarded relief. According to Petitioners, their role as a catalyst in halting the EPA's practice of serially extending interim approvals makes a fee award "appropriate."

II.

Whether Petitioners' role as a catalyst permits fee awards under section 307(f) turns on the meaning of two Supreme Court decisions. In *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Supreme Court held that section 307(f)'s "whenever . . . appropriate" standard prohibits awards to parties who *lose* on the merits. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), the Court held that a different statutory standard, one that authorizes fee

awards to "prevailing part[ies]," prohibits awards to catalyst parties, defined as those who "achieve [ ] the desired result[s] because the lawsuit[s] brought about . . . voluntary change[s] in the defendant[s'] conduct." *Id.* at 601. Because *Ruckelshaus* did not involve a catalyst party, and because *Buckhannon*, which did, concerned a different statute, neither case addresses the precise issue we face here. Even so, the parties, though they read *Ruckelshaus* and *Buckhannon* quite differently, agree that the two cases are dispositive, as do we.

Ruckelshaus began when this court found a fee award to be "appropriate" because the parties requesting fees, though having lost on the merits, had served as "expert and articulate spokesmen for environmental . . . interests" without whom "the process of judicial review might have been fatally skewed." *Sierra Club v. Gorsuch*, 672 F.2d 33, 41 (D.C. Cir. 1982). The Supreme Court reversed, explaining that "[i]t is difficult to draw any meaningful guidance from § 307(f)'s use of the word 'appropriate,' which means only 'specially suitable: fit, proper.'" *Ruckelshaus*, 463 U.S. at 683 (citation omitted). "Our basic point of reference," the Court said, "is the 'American Rule,'" under which parties bear their own attorney's fees. *Id.* at 683-84. The Court explained that although Congress has often departed from the American Rule by shifting fees from the "prevailing," "substantially prevailing," or "successful" party to the losing party, the additional departure of "shifting fees from the losing party to the winning party" would require "a clear showing that this result was intended." *Id.* at 684-85. Moreover, the Court explained, because section 307(f) "affects fee awards against the United States, as well as against private

individuals," it triggers the interpretive canon that "[w]aivers of immunity must be construed strictly in favor of the sovereign" and "not enlarged beyond what the language requires." *Id.* at 685 (internal quotation marks and citations omitted). Applying these two interpretive presumptions, the Court concluded that "the term 'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.* at 686.

The Court found support for this conclusion in its analysis of the statute's legislative history. The Court began by quoting from a 1977 House Report stating that, "[i]n the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." *Id.* at 687 (quoting H.R. Rep. No. 95-294, at 337 (1977)). The Report goes on to explain, in language italicized by the Court, that "*[t]he committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party.'*" *Id.* Seeking to "determin[e] the meaning of [Congress's] rejection of the 'prevailing party standard,'" the Court then surveyed lower court decisions that had applied the "prevailing party" standard "in a variety of rather narrow ways," concluding that "[s]ection 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing parties*—parties achieving *some success*, even if not major success." *Id.* at 687-88 (emphases in original).

The Court also quoted from the 1970 Senate Report on CAA section 304(d), upon which section 307(f) was modeled, noting that "[b]ecause . . . §§ 304(d) and 307(f) have similar meanings, the history of § 304 is relevant to a construction of § 307(f)." *Id.* at 692 n.13. The quoted Senate Report explains that "[t]he Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party." *Id.* at 686 n.8 (quoting S. Rep. No. 91-1196, at 38 (1970)) (emphasis in original). The Report then explains that fee awards "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." *Id.* Analyzing the Senate Report, the Court concluded in footnote eight—a passage central to our view of the instant case—that

> Congress found it necessary to explicitly state that the term appropriate "extended" to suits that forced defendants to abandon illegal conduct, although without a formal court order; this was no doubt viewed as a somewhat expansive innovation, since, under then-controlling law, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that "appropriate" also would extend to the far more novel, costly, and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, as is

> demonstrated by Congress' careful statement that a *less* sweeping innovation *was* adopted.

Id. (internal citation omitted) (emphases in original).

Buckhannon involved a motion for fees under the Fair Housing Amendments Act and the Americans with Disabilities Act, both of which authorize courts to grant "the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. §§ 3613(c)(2), 12205. The plaintiff brought a preemption challenge to a state law, but the action became moot after the state legislature repealed the allegedly preempted law. Even though the court never ruled on the merits, the plaintiff sought an award of attorney's fees, arguing that its suit was the catalyst for the repeal.

The Supreme Court began its analysis by observing that "the term 'prevailing party' " is "a legal term of art." *Buckhannon*, 532 U.S. at 603. Quoting from *Black's Law Dictionary*, the Court explained that "prevailing party" means "[a] party in whose favor a judgment is rendered." *Id.* Surveying its own precedents involving "prevailing party" fee-shifting statutes, the Court observed that it had never approved an award of attorney's fees without some degree of formal success, concluding:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. at 605 (emphasis in original). Turning to legislative history, the Court found it "at best ambiguous as to the availability of the 'catalyst theory' for awarding attorney's fees." *Id.* at 608. Although the Court also briefly discussed the parties' various policy arguments, it concluded that, "[g]iven the clear meaning of 'prevailing party' in the feeshifting statutes, we need not determine which way these various policy arguments cut." *Id.* at 610. At no point in the opinion did the Court discuss *Ruckelshaus*, much less cite it.

It is on the field of *Ruckelshaus* and *Buckhannon* that the parties in this case do battle. According to the EPA, section 307(f)'s plain language and legislative history, interpreted in light of the canons of construction employed in *Ruckelshaus*, require that, to be eligible for a fee award, a party must have received some form of court-awarded relief. *Ruckelshaus*'s footnote eight discussion of the catalyst theory, the EPA insists, is *dictum*. The EPA also contends that because *Ruckelshaus* says that section 307(f) applies only to fully and "partially prevailing parties," 463 U.S. at 688, *Buckhannon*'s rejection of the catalyst theory for "prevailing party" statutes applies to section 307(f) as well. Petitioners have a very different view of these two cases. They argue that *Ruckelshaus*'s footnote eight interpretation of section 307(f) controls. *Buckhannon*, they insist, applies only to "prevailing party" feeshifting provisions.

Were we operating on a clean slate concerning section 307(f)'s meaning, we would accept the EPA's invitation to apply standard tools of statutory construction, including *Ruckelshaus*'s presumptions against inferring departures from the American Rule and waivers of sovereign immunity. Our slate, however,

is far from clean, for in resolving the issue before it in *Ruckelshaus*, the Supreme Court engaged in an analysis of section 307(f) and its legislative history that determines the outcome of the catalyst issue we face here. Specifically, *Ruckelshaus* interprets the 1970 Senate Report as demonstrating that Congress did in fact authorize fee awards under section 307(f) for "suits that forced defendants to abandon illegal conduct, although without a formal court order." 463 U.S. at 686 n.8. The Court explained that the "*less* sweeping innovation" (recovery without formal court order) "*was* adopted," while the more "far-reaching result" (recovery by parties losing on the merits) was not. *Id.* (emphases in original). The EPA resists this interpretation, but neither in its brief nor at oral argument —where we spent considerable time on the topic—was it able to offer any interpretation of the "less sweeping innovation" that Congress adopted other than the catalyst theory. *Id.*

At bottom, the EPA's only real argument against treating footnote eight as controlling authority is to dismiss it as *dictum*. For this "inferior Court[ ]," U.S. CONST. art. III, § 1, cl. 1, however, that argument carries no weight since "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (internal quotation marks and citation omitted); *see also Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be *dicta*, but Supreme Court *dicta* tends to have somewhat greater force—particularly when expressed so unequivocally.").

Moreover, we are not at all certain that footnote eight is *dictum*. The footnote's logic is this: (1) We

know Congress authorized catalyst fee recoveries because it said so; therefore (2) we assume Congress rejected losing party recoveries because it remained silent on the issue. To reject the validity of the first proposition—as the EPA urges—would pull the rug from under footnote eight. To be sure, footnote eight is only one among several justifications that *Ruckelshaus* gives for its ultimate holding, but we "cannot ignore the unmistakable import of [a Supreme Court decision's] analysis." *Oakar*, 111 F.3d at 153.

Our understanding of *Ruckelshaus* also comports with the Supreme Court's conclusion, this time in true *dictum*, that nearly-identical "whenever . . . appropriate" language in the pre-1987 Clean Water Act authorizes fee awards in cases where the plaintiff obtains no court-awarded relief. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), the Court held that citizens may sue under the Clean Water Act only for present, not past, statutory violations. Discussing the possibility that statutory violators could strategically moot enforcement actions by complying with the statute after the actions had been filed, the Court observed not only that mootness doctrine provides plaintiffs with certain protections against game-playing violators, but also that

> Under the Act, plaintiffs are . . . protected from . . . suddenly repentant defendant[s] by the authority of . . . district courts to award litigation costs "whenever the[y] . . . determine[ ] such award[s] [are] appropriate." 33 U.S.C. § 1365(d). The legislative history of this provision states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a

> citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 92-414, p. 81 (1971), 2 Leg. Hist. 1499.

Id. at 67 n.6; *see also Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 51 (D.C. Cir. 1987) (reviewing the district court's award of attorney's fees under another "whenever . . . appropriate" fee-shifting provision and concluding that "as the decisions under other fee statutes indicate, to permit a fee award a party's litigation efforts need not be the demonstrably exclusive cause of the relief it sought; rather, the party may receive an award for time spent on activities that served as a 'catalyst' or contributing factor to that result").

Nothing in *Buckhannon* alters our conclusion that *Ruckelshaus*'s footnote eight controls the issue now before us. Although *Buckhannon* rejected the catalyst theory, the statute at issue there authorizes fee awards only to "prevailing part[ies]." By comparison, *Ruckelshaus*'s footnote eight analysis directly applies to the issue we face here, as it interprets section 307(f) to authorize fee awards for "suits that forced defendants to abandon illegal conduct, although without a formal court order." 463 U.S. at 686 n.8.

The most one can say of *Buckhannon* is that it impliedly casts doubt on footnote eight. The EPA takes just this position. Reading *Buckhannon*'s conclusion that "prevailing" means being "awarded some relief by the court," 532 U.S. at 603, in light of *Ruckelshaus*'s statement that "[s]ection 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties," 463 U.S.

at 688 (emphasis omitted), the EPA argues that section 307(f) requires some court-awarded relief. Even setting aside footnote eight, however, we think this inference quite dubious. The fact that the Supreme Court held in the context of a fully adjudicated claim that the "whenever . . . appropriate" standard expands the class of eligible parties to those who partially prevail on the merits does not address the status of parties who obtain significant success without adjudication. Even were we to accept the EPA's interpretation of "partially prevailing parties," the passage from *Ruckelshaus* that the EPA relies on is entirely consistent with the possibility that section 307(f) expands the class from prevailing parties to "partially prevailing parties" *and* to parties achieving no formal court-awarded success (a possibility footnote eight later confirms). Moreover, because the Supreme Court has warned against "dissect[ing] the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), we think it inappropriate to read a "prevailing party" requirement into section 307(f) just because the *Ruckelshaus* Court, not Congress, used that term.

In the end, we need not decide whether *Buckhannon*—which never so much as mentions *Ruckelshaus*—impliedly overrules footnote eight, for *Buckhannon*'s failure to do so expressly is dispositive. If "a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Here, the

case that "directly controls" is *Ruckelshaus*. Whether *Ruckelshaus* "rest[s] on reasons rejected" by *Buckhannon* is a matter for the Supreme Court, not us.

Our two sister circuits to have addressed the relationship between *Ruckelshaus* and *Buckhannon* have reached the same conclusion. In *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002), the Eleventh Circuit relied on *Ruckelshaus* for the proposition that catalyst recoveries are permitted by "whenever . . . appropriate" statutes and distinguished *Buckhannon* as applying only to "prevailing party" statutes, specifically noting that "*Buckhannon* makes no reference whatsoever to *Ruckelshaus* or to the 'whenever . . . appropriate' class of fee-shifting statutes." *Id.* at 1326. In *Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001), although the parties did not raise the issue, the Tenth Circuit distinguished *Buckhannon* as applying only to "prevailing party" statutes.

The EPA's two remaining arguments require little discussion. The agency claims that allowing catalyst recoveries under section 307(f) will "create an unnecessary patchwork among fee-shifting statutes," since *Buckhannon* prohibits such recoveries under the "prevailing party" standard. Respondents' Br. at 13. The simple and dispositive answer to this argument is *Ruckelshaus*, which tells us that Congress enacted section 307(f)'s "whenever . . . appropriate" language for two reasons: to "reject[ ] . . . the 'prevailing party' standard," 463 U.S. at 687, and to authorize fee awards to parties "that forced defendants to abandon illegal conduct, although without a formal court order," *id.* at 686 n.8. It was thus Congress that created the "patchwork."

The EPA's other argument suffers essentially the same defect. The agency claims that the catalyst theory would "embroil courts in a second major litigation" over whether plaintiffs caused defendants' changes in conduct. Respondents' Br. at 14. It is true that *Buckhannon* notes that one policy argument against the catalyst theory is that it might "spawn[ ] a second litigation of significant dimension." 532 U.S. at 609 (internal quotation marks and citation omitted). Yet in the very next paragraph, *Buckhannon* points out that, in light of clearly expressed Congressional intent, "we need not determine which way these various policy arguments cut." *Id.* at 610. The same is true here. *Ruckelshaus* establishes that Congress, by enacting section 307(f), intended for courts to decide when fee awards, even in the catalyst context, are "appropriate."

III.

Having held that the "whenever . . . appropriate" standard authorizes recovery under a catalyst theory, we turn to the question of whether such an award is "appropriate" in this case. On this issue, *Buckhannon* provides useful guidance. Though the Court split five to four on the propriety of catalyst recovery under the "prevailing party" standard, all nine Justices agreed, albeit in *dictum*, on the correct standard for whether a lawsuit qualifies as a catalyst. In a passage arguing that the majority should have given greater weight to lower court decisions approving catalyst recoveries, the dissent synthesized decisions that had articulated the standard:

> The array of federal court decisions applying the catalyst rule suggested three conditions necessary

> to a party's qualification as "prevailing" short of a favorable final judgment or consent decree. A plaintiff first had to show that the defendant provided "some of the benefit sought" by the lawsuit. Under most Circuits' precedents, a plaintiff had to demonstrate as well that the suit stated a genuine claim, *i.e.*, one that was at least "colorable," not "frivolous, unreasonable, or groundless." Plaintiff finally had to establish that her suit was a "substantial" or "significant" cause of defendant's action providing relief. In some Circuits, to make this causation showing, plaintiff had to satisfy the trial court that the suit achieved results "by threat of victory," not "by dint of nuisance and threat of expense." One who crossed these three thresholds would be recognized as a "prevailing party" to whom the district court, "in its discretion," could award attorney's fees.

Id. at 627-28 (Ginsburg, J., dissenting) (citations omitted). Not only did the majority express no disagreement with this statement of the law, but, citing the dissent, it said that it did "not doubt the ability of district courts to perform the nuanced 'three thresholds' test *required* by the 'catalyst theory'—whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct; whether the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense." *Id.* at 610 (emphasis added). Although the majority summarized the three thresholds somewhat differently—failing to mention the "some of the benefit sought" element and treating "causation" and "threat of victory rather than threat of

expense" as separate elements rather than two aspects of the same element—nothing suggests that the majority disagreed with the dissent's position that only a plaintiff achieving "some of the benefit sought" is entitled to fees.

Judged against this so-called three thresholds test, Petitioners' fee motion is easily resolved. Nowhere does the EPA suggest that Petitioners' motion fails to satisfy the second and third thresholds, and for good reason: Petitioners' claim was obviously colorable and their suit quite clearly caused the EPA to accept the settlement's terms. *Cf. Save Our Cumberland Mountains*, 826 F.2d at 51 ("[T]he temporal sequence of plaintiff's litigation followed by defendant's remedial activity is strong evidence of a causal relationship."). Thus, we need only consider the first threshold: Did the settlement provide Petitioners "some of the benefit sought"? *Buckhannon*, 532 U.S. at 627 (Ginsburg, J., dissenting) (internal quotation marks and citation omitted).

Answering no, the EPA points out that the settlement agreement did not require it to withdraw the May 22, 2000 rule, but instead allowed the interim approvals to lapse in December 2001, just as the rule provided. Although this is true, it establishes only that Petitioners failed to achieve *all* the relief sought, not that they achieved *none*. By arguing that Title V expressly forbade interim approval extensions lasting more than two years, Petitioners necessarily sought more than just invalidation of the EPA's specific rule. A court order invalidating the EPA's May 22 rule based on Petitioners' interpretation of Title V would also—whether expressly or impliedly—have invalidated any regulation or other rule permitting extensions lasting more

than two years. Thus, since the settlement agreement (1) prohibited the EPA from granting additional interim approvals past December 2001 and (2) required the EPA to amend 40 C.F.R. § 70.4(d)(2), Petitioners unquestionably achieved some of the relief they sought.

The EPA's arguments to the contrary are unpersuasive. The agency contends that the settlement agreement's prohibition against further interim approval extensions was redundant because the May 22 rule gave notice that the EPA would offer no further interim approvals. As the record demonstrates, however, the EPA's promise was not binding. For example, in 1995 the agency granted Title V interim approval extensions in Delaware and Wisconsin, subject to the caveat that the extensions would "not be renewed." Title V Clean Air Act Final Interim Approval of Operating Permits Program; State of Delaware, 60 Fed. Reg. 62,032, 62,033 (Dec. 4, 1995); Clean Air Act Final Interim Approval of the Operating Permits Program; Wisconsin, 60 Fed. Reg. 12,128, 12,136 (Mar. 6, 1995). Yet the 1997, 1998, and 2000 blanket extensions did just that. In contrast, the settlement agreement, like any relief that this court might have granted on the merits, bound the EPA.

Finally, the EPA argues that requiring it to amend 40 C.F.R. § 70.4(d)(2) does not constitute relief that Petitioners sought because the regulation "was not the basis for the May 22, 2000 extension challenged in this case." Respondents' Br. at 5 n.2; *see also id.* at 15. Not so. The EPA could have used the regulation, if left unchanged, to authorize further interim approval extensions, thereby frustrating Petitioners' basic goal of ending the agency's serial interim approval extensions.

IV.

Because we hold that CAA section 307(f) authorizes awards of attorney's fees to catalyst parties, and finding an award "appropriate" under the circumstances of this case, we grant Petitioners' motion.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2001

No. 00-1262

SIERRA CLUB AND
NEW YORK PUBLIC INTEREST RESEARCH GROUP,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND
CAROL M. BROWNER, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

Filed: Jan. 25, 2002

ORDER

Upon consideration of the stipulation for dismissal of the petition for review, it is

ORDERED that the Clerk note on the docket that this case is dismissed. No mandate will be issued. Pursuant to the parties' stipulation, petitioners may file a motion for attorneys' fee on or before April 2, 2002.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Mark Butler
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2002

No. 00-1262

SIERRA CLUB AND
NEW YORK PUBLIC INTEREST RESEARCH GROUP,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND
CHRISTINE TODD WHITMAN, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

Filed: June 5, 2003

ORDER

Before: GINSBURG, Chief Judge, and ROGERS and TATEL, Circuit Judges

Upon consideration of respondents' petition for rehearing filed May 12, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2002

No. 00-1262

SIERRA CLUB AND
NEW YORK PUBLIC INTEREST RESEARCH GROUP,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND
CHRISTINE TODD WHITMAN, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

Filed: June 5, 2003

ORDER

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND,* Circuit Judges

Upon consideration of respondents' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

* Circuit Judge Garland did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1262

SIERRA CLUB AND
NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,
PETITIONERS

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND
CAROL BROWNER, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

SETTLEMENT AGREEMENT

WHEREAS Petitioners Sierra Club and the New York Public Interest Research Group, Inc. (collectively "Sierra Club") filed the above captioned petition for review challenging the final action taken under the Clean Air Act ("CAA") by the Environmental Protection Agency ("EPA"), entitled "Extension of Operating Permits Program, Interim Approval Expiration Dates," 65 Fed. Reg. 32,035 (May 22, 2000) ("Interim Approval Extension");

WHEREAS EPA does not intend to grant an additional extension to the state permit programs operating under interim approval that received the extension under the Interim Approval Extension, and EPA intends to take the steps necessary to ensure that an operating permit program under 40 C.F.R. Part 71 is in

effect by December 1, 2001, in each area for which EPA has not issued a full program approval by December 1, 2001.

WHEREAS EPA and Sierra Club (collectively the "Parties") wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

NOW, THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. Within three days after this Agreement is executed by the Parties (i.e., signed), but before finalization pursuant to paragraph 8 of this Agreement, the Parties shall file a joint motion with the Court notifying it of this Agreement and requesting that the briefing schedule in this case be vacated, and that this petition for review be held in abeyance pending implementation of, and subject to, the terms of this Settlement Agreement.

2. The Sierra Club shall have the right to request that the Court lift the stay of proceedings referred to in paragraph 1 above and to establish a schedule for briefing and oral argument, and EPA shall not oppose such a request to lift the stay, if and only if any one of the following events occur:

A. If EPA fails to sign no later than December 15, 2000, a notice of proposed rulemaking that proposes to make amendments to 40 C.F.R. § 70.4(d)(2) that are the same in substance as set forth in Attachment C to this Agreement.

B. If EPA fails to sign no later than June 1, 2001, a notice of final action that adopts amendments to 40

C.F.R. § 70.4(d)(2) that are the same in substance as set forth in Attachment C to this Agreement.

C. If EPA fails to send, within 10 days of the date that the Parties execute this Settlement Agreement, letters to the permitting authority for each of the areas listed in Attachment A that provide notification to such areas the same in substance as that set forth in Attachment D.

D. If EPA signs a proposed or final rule to extend the interim approval of the title V permit program for one or more of the areas listed in Attachment A.

E. If EPA fails to sign, within 10 days of the date that the Parties execute this Settlement Agreement, a notice for publication in the Federal Register informing the public of a 90-day opportunity to identify any programmatic and/or implementation deficiencies in State Title V Permit Programs that have been granted full or interim approval that were not raised at the time of the interim or full approval of the Title V Permit Program for a specific permitting authority, which notice provides for the same in substance as that set forth in Attachment E.

F. If for the notices described in paragraphs 2.A., 2.B, and 2.E above, EPA fails to deliver such notices, within 5 business days of signing such notices, to the Office of the Federal Register for publication.

G. If EPA withdraws the notices referred to in paragraph 2.A or in paragraph 2.E (including the 90-day comment period referred to in paragraph 2.E), or modifies said notices in such a manner that they do

not provide for the same in substance as that set forth in Attachments C or E, respectively, or if EPA withdraws the final action referred to in paragraph 2.B, or modifies said final action in such a manner that it does not provide for the same in substance as that set forth in Attachment C.

H. If EPA fails to provide Sierra Club beginning 120 days from the date this Agreement is executed by the parties, and at 120-day intervals thereafter, with a status report on the Agency's progress and the status of implementation of this Agreement.

I. If EPA fails to notify Sierra Club in writing that EPA has signed any notice or letter described in paragraphs 2.A, 2.B, 2.C, 2.D, 2.E, and 2.G above, within 5 business days of having signed any such notice or letter.

J. If EPA has not notified the Sierra Club within 120 days of executing this Agreement that this Agreement is final in accordance with paragraph 8 below.

Before Sierra Club may move to lift the stay of this case pursuant to subparagraphs A, B, C, E, F, H, I, and J above, on the basis that EPA failed to take a referenced action by the specified date in those subparagraphs, Sierra Club shall notify EPA in writing of its intent to move to lift the stay 3 business days before filing such a motion. If EPA takes the referenced action within 3 business days of having received such notice, Sierra Club may not move to lift the stay on that basis. The terms of this paragraph under which Sierra Club may lift the stay of this case shall apply during (but not limited to) the time EPA considers whether to

finalize this Agreement in accordance with paragraph 8 below.

3. Sierra Club shall not challenge in any court or administrative proceeding the validity of any EPA revision to 40 C.F.R. § 70.4(d)(2) that, in accordance with paragraph 2.B. above, provides for the same in substance as that contained in Attachment C to this Agreement, provided that Sierra Club reserves any rights it may have to challenge in any court or administrative proceeding any portion of such revision that is not the same in substance as that contained in Attachment C to this Agreement.

4. For purposes of this Agreement, if any EPA action in accordance with paragraphs 2.C and 2.E above does not include the actual dates or time periods set out in Attachments D and E, then such EPA action shall not be considered to be the same in substance as that set forth in said Attachments. The Parties agree that the preceding sentence does not set out the exclusive bases on which such EPA actions may be considered not to provide for the same in substance as that set forth in said Attachments.

5. Notwithstanding any other provision of this Agreement, within 20 days of December 1, 2001, the Parties shall file a joint stipulation of dismissal of petition for review No. 00-1262 in accordance with Rule 42 of the Federal Rules of Appellate Procedure, if, by December 1, 2001, (a) for each area in Attachment A, EPA has either taken final action fully approving the Title V Permit Program or the federal Title V permit program has taken effect, (b) EPA has not extended the interim approval of the State Title V Permit Programs for one or more of the areas listed in Appendix A, (c) the stay of litigation has not been lifted in accordance

with paragraph 2 above, and (d) a motion by Sierra Club to lift the stay in accordance with paragraph 2 has not been pending before the Court for more than 60 days. At Sierra Club's request, EPA shall provide the Sierra Club with verification that the terms of provisions (a) and (b) of this paragraph for a stipulated dismissal have been met. Such stipulation of dismissal shall provide an opportunity for Sierra Club to petition the Court for attorneys' fees within a reasonable period of time, which petition EPA may oppose, and for the Court to resolve the merits of any such contested petition. This paragraph sets out the terms for a stipulated dismissal only, and neither party concedes that all or any portion of such terms necessarily establish either necessary or sufficient grounds for the dismissal of petition for review No. 00-1262, where the claim for dismissal is contested.

6. The dates for any EPA action under this Agreement, unless otherwise provided, shall be the date of signature by the Administrator or her delegate.

7. The Parties in their joint motion referred to in paragraph 1 shall request that EPA provide the Court with status reports at 120-day intervals to inform the Court of the status of the Agency's implementation of the Settlement Agreement.

8. The Parties agree and acknowledge that before this Agreement is final, EPA must provide notice in the *Federal Register* and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA shall submit said notice of this Agreement to the *Federal Register* for publication as expeditiously as possible. After this Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropri-

ate, shall promptly consider any such written comments in determining whether to withdraw or withhold her consent to the Agreement, in accordance with section 113(g) of the Clean Air Act. This Agreement shall become final on the date that EPA notifies such parties in writing of such finality to the Parties.

9. Nothing in this Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law. In addition, nothing in this Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise any regulations, guidance, or interpretations EPA may issue in accordance with this Agreement from time to time or to promulgate or issue superseding regulations, guidance, or interpretations.

10. Except as set out in this Agreement, the parties retain all rights they may otherwise have.

11. The undersigned representatives of each party certify that they are fully authorized by the party that they represent to bind that respective party to the terms of this Agreement.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General

/s/ DAVID J. KAPLAN
DAVID J. KAPLAN, Attorney
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0997

For Respondent

/s/ DAVID BARON
DAVID BARON
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.
Washington, D.C. 20036-2212
(202) 667-4500

For Petitioners

Dated: November 21, 2000

Dated: November 20, 2000

ATTACHMENT A

STATE AND LOCAL OPERATING PERMITS PROGRAMS WITH INTERIM APPROVAL

Alabama
Huntsville, AL
Jefferson County, AL

Alaska

Arizona
Maricopa County, AZ
Pima County, AZ
Pinal County, AZ

Arkansas

Amador County APCD, CA
Bay Area AQMD, CA
Butte County APCD, CA
Calaveras County APCD, CA
Colusa County APCD, CA
El Dorado County APCD, CA
Feather River AQMD, CA
Glenn County APCD, CA
Great Basin Unified APCD, CA
Imperial County APCD, CA
Kern County APCD, CA
Lake County AQMD, CA
Lassen County APCD, CA
Mariposa APCD, CA
Mendocino County APCD, CA
Modoc County APCD, CA
Mojave Desert AQMD, CA
Monterey Bay Unified APCD, CA
North Coast Unified AQMD, CA

Northern Sierra AQMD, CA
Northern Sonoma County APCD, CA
Placer County APCD, CA
Sacramento Metropolitan AQMD, CA
San Diego APCD, CA
San Joaquin Valley Unified APCD, CA
San Luis Obispo County APCD, CA
Santa Barbara County APCD, CA
Shasta County AQMD, CA
Siskiyou County APCD, CA
South Coast AQMD, CA
Tehama County APCD, CA
Tuolumne County APCD, CA
Ventura County APCD, CA
Yolo-Solano AQMD, CA

Connecticut

Delaware

District of Columbia

Florida

Hawaii

Idaho

Illinois

Indiana

Kentucky

Maine

Maryland

Massachusetts

Michigan

Minnesota

Montana

Nevada
Washoe County, NV
Clark County, NV

New Hampshire

New Jersey

New York

North Carolina
Western North Carolina
Mecklenburg County, NC

Oklahoma

Rhode Island

Tennessee
Memphis-Shelby County, TN

Texas

Vermont

Virgin Islands

Virginia

Washington
Benton County, WA
Northwest AP Authority, WA
Olympic AP Control Authority, WA
Puget Sound, WA
Southwest AP Control Authority, WA

Spokane County, WA
Yakima County, WA

West Virginia

Wisconsin

ATTACHMENT B

STATE AND LOCAL OPERATING PERMITS PROGRAMS WITH FULL APPROVAL

Colorado

Georgia

Iowa

Kansas

Louisville-Jefferson County, KY

Louisana

Mississippi

Missouri

Nebraska
Lincoln-Lancaster County, NE
Omaha-Douglas County, NE

New Mexico
Albuquerque, NM

Forsyth County, NC

North Dakota

Ohio

Oregon
Lane Regional, OR

Pennsylvania

Puerto Rico

South Carolina

South Dakota

Nashville-Davidson County, TN
Hamilton County, TN
Knox County, TN

Utah

Wyoming

ATTACHMENT C

Proposed Revised Text for the first three sentences of 40 C.F.R. § 70.4(d)(2):

Interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval ~~unless a longer period of time up to 10 months is provided on an individual basis by the Administrator through rulemaking))~~, and may not be renewed. ~~Notwithstanding the previous sentence, the Administrator may, through rulemaking, provide for a longer period of time on an individual basis, but only once per State, as necessary to allow for a State to submit one set of program changes addressing both interim approval deficiencies and program changes necessary to comport with the next revision to 70.7 that is made after [date of publication]. Any longer period of time provided by the Administrator shall not exceed 2 years after publication in the federal register of that revision.~~

ATTACHMENT D

For inclusion in the notice to permitting authorities in an EPA letter in accordance with Paragraph 2.C. of this Agreement:

(i) Under the Interim Approval Extension, by June 1, 2001, States are to submit a revised Title V Permit Program, for each area identified in Attachment A, that addresses the deficiencies previously identified at the time such area received interim approval, in order to provide EPA sufficient time to approve or disapprove such programs by December 1, 2001;

(ii) the federal permit program will apply automatically in each area for which EPA has not issued a full approval of the Title V Permit Program by December 1, 2001; and

(iii) EPA does not intend to provide an additional extension of interim approval authority for any area listed in Attachment A

ATTACHMENT E

For inclusion in a Federal Register notice providing the public a 90-day period to identify deficiencies in State Title V Permit Programs, in accordance with Paragraph 2.E:

(i) EPA intends to respond on the merits to any such claims of deficiency raised during this 90-day period no later than December 1, 2001 for the areas listed in Attachment A of the Agreement (interim approved programs);

(ii) EPA intends to respond on the merits to any such claims of deficiency raised during this 90-day period no later than April 1, 2002 for the areas listed in Attachment B of the Agreement (fully approved programs);

(iii) EPA believes the time periods in subparagraphs (i) and (ii) above provide adequate time for EPA to respond to comments raised during the aforementioned 90-day comment period;

(iv) for those deficiencies identified during the 90-day comment period with which EPA agrees, EPA intends to issue a notice of deficiency in which EPA specifies the timeframe for the permitting authority to correct any program deficiencies in accordance with 40 C.F.R. § 70.4(i) and any implementation deficiencies in accordance with 40 C.F.R. § 70.10;

(v) for those alleged deficiencies with which EPA disagrees, EPA will explain its reasons for not making a finding of program deficiency and will not assert that the claims of deficiency were waived because they could

have been previously raised at the time the program initially received interim or full approval; and

(vi) in accordance with 40 C.F.R. § 70.4(i), EPA may provide a permitting authority with no more than two years to correct a program deficiency.

APPENDIX F

PARTIAL SETTLEMENT AGREEMENT ON COSTS OF LITIGATION

Introduction

1. This Partial Settlement Agreement on Cost of Litigation ("Settlement Agreement") is entered into by and between the United States, on behalf of the United States Environmental Protection Agency (collectively, "United States"); and Sierra Club and the New York Public Interest Research Group (collectively, "Petitioners").

2. On June 21, 2000, Petitioners filed petition for review No. 00-1262 ("the Litigation") in the United States Court of Appeals for the D.C. Circuit (court) challenging final action of the Environmental Protection Agency (EPA) at 65 Fed Reg. 32035 *et seq.* (May 22, 2000), entitled "Extension of Operating Permits, Program Interim Approval Expiration Dates."

3. On November 21, 2000, the parties executed a Settlement Agreement wherein the parties agreed, *inter alia*: a) to stay the Litigation pending EPA performance of certain specified actions; b) to jointly stipulate to dismissal of the Litigation after certain conditions were met; and c) to provide in the stipulation of dismissal for a opportunity for Petitioners to petition EPA the court for attorneys' fees within a reasonable time, which petition EPA could oppose.

4. On January 11, 2002, the parties filed a stipulation for dismissal pursuant to the above-cited provisions of the November 21, 2000 Settlement Agreement. The stipulation provided that Petitioners would have until

April 2, 2002 to file a motion for attorneys' fees. Upon consideration of the stipulation, the court on January 25, 2002 directed the Clerk to note on the docket that the case was dismissed, and granted Petitioners until April 2, 2002 to file a motion for attorneys' fees. Upon subsequent joint motion of the parties, the court extended the deadline for Petitioners' fee motion to May 16, 2002.

5. The parties do not agree on whether Petitioners are entitled to attorneys' fees with respect to the Litigation. Petitioners contend that they are entitled to attorney's fees, while the United States contends that Petitioners are not entitled to such fees. Petitioners therefore intend to file a motion for attorneys' fees not later than May 16, 2002. The parties do, however, wish to execute a partial settlement on the amount of Petitioners' costs and attorneys' fees in the event that the court determines that Petitioners are entitled to an award of fees. Accordingly, the parties agree as follows:

Agreement

6. Upon a "final judicial determination" that Petitioners are entitled to an award of costs of litigation, including attorneys' fees, ("fees") with respect to the Litigation, the United States shall pay $55,000 to Earthjustice by electronic funds transfer to the following account: . * * *, routing no. * * * , to the account of Earthjustice Legal Defense Fund, account no. * * * . For purposes of this Agreement, a "final judicial determination" occurs as follows: a) If the court determines that Petitioners are entitled to fees ("entitlement order"), a final judicial determination shall be deemed to have occurred when all opportunities for rehearing in the D.C. Circuit and review in the U.S.

Supreme Court have expired or been exhausted without material change to the court's entitlement order; b) If the court determines that Petitioners are not entitled to an award of fees with respect to the Litigation, and that determination is subsequently reversed on review before the United States Supreme Court, a final judicial determination shall be deemed to have occurred on date of the decision by the Supreme Court.

7. Any obligations of the United States to obligate or expend funds under this Settlement Agreement are subject to the availability of appropriations in accordance with the Anti-Deficiency Act, 31 U.S.C. § 1341. This Settlement Agreement shall not be construed to require the United States to obligate or pay funds in contravention of said Anti-Deficiency Act.

8. If the amount agreed upon in paragraph '6' is not paid within 90 days of a final judicial determination of Petitioners' entitlement to fees, Petitioners may make application to the court for an award of fees, pursuant to Clear Air Act §307(f). The United States reserves the right to object to the amount of costs and fees sought in such application.

9. Petitioners agree that payment of the amount referenced in paragraph '6' will constitute full and final payment of all fees incurred in connection with the Litigation, except fees incurred in litigation over Petitioners' entitlement to fees. Upon a final judicial determination that Petitioners are entitled to fees, the parties will attempt to negotiate a separate settlement agreement on the amount of fees incurred in litigation over Petitioners' entitlement to fees. If the parties are unable to conclude such a separate settlement agreement within 90 days of the final judicial determination, Petitioners' may make application to the court for an

award of such fees. The United States reserves the right to object to the amount of fees sought in such application.

10. The parties agree that Petitioners' motion for attorneys' fees, due May 16, 2002, will ask the court to resolve only the issue of Petitioners' entitlement to fees. The motion will notify the court that the United States disputes Petitioners' entitlement to attorney's fee in connection with the Litigation, but that parties have reached a settlement on the fee amount that the United States will pay in the event that the court determines that Petitioners are entitled to fees. The motion will further notify the court that the settlement does not address the amount of fees that may be incurred in litigation over Petitioners' entitlement to fees, but that the parties will attempt to negotiate a settlement over such amount within 90 days of a final judicial determination that Petitioners are entitled to fees.

11. The parties hereby stipulate that the May 16, 2002 deadline for Petitioners' fee motion applies only to a motion seeking a determination of Petitioners' entitlement to fees, and does not apply to the fee applications provided for in paragraphs 8 and 9 above. The parties further stipulate that the deadline for any fee applications allowed by paragraphs 8 and 9 shall be 90 days after a final judicial determination that Petitioners are entitled to fees.

12. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to enter into this Settlement Agreement.

SO AGREED:

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

Date: 5-10-02

/s/ DAVID J. KAPLAN
DAVID J. KAPLAN
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0997

ON BEHALF OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 5/10/02

/s/ DAVID S. BARON
DAVID S. BARON
Earthjustice Legal Defense Fund
1625 Massachusetts Avenue, NW
Suite 702
Washington, D.C. 20036
(202) 667-4500

ON BEHALF OF SIERRA CLUB AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

APPENDIX G

STATUTORY PROVISIONS INVOLVED

Section 307 of the Clean Air Act provides in relevant part:

Administrative proceedings and judicial review

* * * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [sic] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations

thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. * * *

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(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

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42 U.S.C. 7607.

Section 502 of the Clean Air Act provides in relevant part:

Permit programs

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(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. * * *

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(d) Submission and approval

(1) Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. * * *

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(g) Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rule-making, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of

any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

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42 U.S.C. 7661a.